DIMENSIONS OF DEMOCRACY

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I. ONE-DIMENSIONAL DEMOCRACY

A popular account of democracy reduces it to one dimension: government is democratic if and only if it implements the will of electoral majorities.¹ One-dimensional democrats argue about the relative merits of legislatures and plebiscites. They disagree about whether democracy requires high levels of citizen participation, or whether it instead permits citizens to delegate their power to elite representatives. One-dimensional democrats differ, in short, about what kinds of electoral majorities are constitutive of democracy. But one-dimensional democratic theory leaves no doubt about the importance of such majorities. The democratic credentials of any government must be measured by reference to a single variable: how responsive is that government to the decisions of properly constituted electoral majorities?

Neither judicial review nor constitutionalism fare well under this test. Judicial review constrains the power of electoral majorities. So do super-majoritarian barriers to constitutional amendment. According to one-dimensional democratic theory, these institutions are presumptively anti-democratic. They suffer, in the famous phrase of Alexander Bickel, from a “counter-majoritarian difficulty.”² Constitutional theorists have fixated upon this problem for decades.³

Yet, despite its popularity, the one-dimensional account of democracy has obvious defects. It ignores, for example, the practical

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¹ One-dimensional democracy has a venerable pedigree. It traces back at least to John Locke, who wrote, “The Majority, having . . . the whole power of the community . . . may employ all that power in making laws for the community from time to time, and executing those laws by officers of their own appointing; and then the form of the government is a perfect democracy . . . .” John Locke, The Second Treatise of Government 73 (Thomas P. Peardon ed., The Liberal Arts Press 1952) (1690).
² Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16 (1962).
characteristics of mass electorates, which are notoriously non-deliberative and arguably manipulable. It provides no way to explain why “majority tyranny” might be undemocratic rather than merely unjust. It condemns as undemocratic virtually every nation in the world today, all of which supplement legislatures and elections with non-majoritarian institutions of various kinds—including not just constitutional courts and super-majoritarian constitutions but also central banks and independent agencies.

Jed Rubenfeld and I have written books linked by, among other things, shared dissatisfaction with the one-dimensional account of democracy. We believe that democracy does not reduce to majority rule. We believe, more specifically, that “the people” is something different from (and better than) “an electoral majority,” so that “government by the people” differs in principle from “majority rule.” In our view, a political system that maximizes the power of majorities may be undemocratic precisely because it is so thoroughly majoritarian. We also believe that judicial review and inflexible constitutions, rather than being anti-democratic, may be pro-democratic precisely because they limit the power of electoral majorities.

Neither Rubenfeld nor I deny the importance of majoritarian elections to democratic government. Periodic elections provide indispensable representations of the people. They provide a kind of snapshot of public opinion: An election depicts how this particular people, acting as voters, responded to this specific question (for example, “Whom do you want for your president—George Bush, Al Gore, or somebody else?”) at this moment. Yet, just as a photograph yields only a flattened, incomplete representation of a person, so too an election produces only a flattened, incomplete representation of a people. That will be true even with regard to a collection of high quality elections, just as it would be true with regard to an album of high quality portraits.

There is thus real substance to the similarity of our book titles, both of which refer to “Constitutional Self-Government.” Rubenfeld and I seek, in different though not contradictory ways, to restore missing dimensions of democracy. Rubenfeld’s book, Freedom and Time: A

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5. The two of us might, in principle, have used “constitutional self-government” in different ways. Walter Murphy, for example, uses “constitutional democracy” to describe a blend of “constitutionalism and democracy” rather than a form of democracy. Walter F. Murphy, Alternative Political Systems, in Constitutional Politics: Essays on Constitution Making, Maintenance and Change 9, 11 (Sotirios A. Barber & Robert P. George eds., 2001).

6. My distinction between “one-dimensional” and “multi-dimensional” democratic theory will remind some readers of Bruce Ackerman’s distinction between “monist” and “dualist” democracy. I Bruce Ackerman, We the People:
Theory of Constitutional Self-Government, emphasizes the dimension of time. Rubenfeld maintains that for a people to exist and govern itself freely, it must make durable, generation-spanning commitments. Perfect sensitivity to the electoral expression of momentary preferences is undemocratic because it prevents a people from having and honoring such commitments. My theory, by contrast, emphasizes dimensions of democracy that exist at a single moment and so might be called (though only metaphorically) "spatial." I argue in Constitutional Self-Government that the offices of "legislator" and, more radically, "voter" carry with them specific incentives that will skew decision-making about some issues, especially moral issues related to political justice. I accordingly maintain that a system may become more democratic by supplementing legislatures and elections with other institutions that correct these predictable defects.

In Section II of this essay, I explore the challenges that confront multi-dimensional democratic theory, and then I describe Rubenfeld's theory and my own. In Section III, I compare the two theories, noting important overlaps and divergences. In Section IV, I pose some questions about Rubenfeld's theory. Finally, in Section V, I consider how Freedom and Time and Constitutional Self-Government fit into the evolving agenda of constitutional scholarship.

II. Multi-Dimensional Democracy

A. The Challenge of Democracy in Large Polities

In a tiny and virtuous city-state, democracy has a natural form. It involves periodic legislative assemblies in which all citizens participate. If the city-state is truly virtuous, debates will be inclusive and respectful. After giving everybody a chance to speak, the citizens vote. The majority's choice prevails, but, because the citizens respect one another, the majority's judgment will have been informed by the views and interests of the minority. No actual polity could live up to these high standards, but this form of democracy nevertheless

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Footnotes:

1. Foundations 3-10 (1991). The resemblances are real. Ackerman criticizes "monists" for believing that ordinary elections provide a fully satisfactory representation of the people. Like Rubenfeld and myself, he seeks a more complex theory that provides a better representation of the people. His theory, like ours, holds out the promise of a pro-democratic role for Court and Constitution. Id. at 9-10. On the other hand, it is arguable that Ackerman's "dualism" still leaves him with a one-dimensional democratic theory: his theory still centers on the idea that democratic government must be sensitive to voting majorities of the right kind, although the kind is special indeed.


8. Some people suppose that this idealized version of democracy existed in ancient Athens or New England town meetings, but historians and political scientists paint a more complex picture of these political systems. Id. at 18-20, 56-67. For an
constitutes a recognizable ideal. Political theorists refer to it as "face-to-face democracy." 

Face-to-face democracy has no counterpart in large nation-states. In a polity the size of the United States (or, for that matter, the size of Rhode Island, or even the city of Providence), the citizens are too numerous to assemble, deliberate, and decide as a whole. Making sense of democracy in modern nation-states is therefore difficult. Even small polities contain people with differing preferences and values who disagree sharply. In large polities, people differ from one another along innumerable dimensions. They have never seen most of their fellow citizens, much less spoken to them. They may not even share a language in common. In political battles, some of these people must win and others must lose. It thus seems obvious that not all of them can exercise real power—some people will, rather than making policy, find themselves governed by the policies of their rivals. Under such circumstances, what can it possibly mean for the whole people to govern themselves?

One-dimensional democrats sometimes suppose that they have found a way to extrapolate face-to-face democracy to fit the circumstances of modern nations. By granting all power to an elected legislature, a nation retains two attractive features of face-to-face democracy. Legislative governance preserves the principle of "one person, one vote," since all citizens get to vote for their legislative representatives, just as citizens get to vote at town meetings. Legislative governance also preserves the practice of face-to-face deliberation. Legislators deliberate before voting, just as citizens deliberate at town meetings.

These are real virtues. Yet, as James Fishkin has pointed out, these virtues are not sufficient to make legislative governance a satisfactory translation of face-to-face democracy. The problem is simple: although one-dimensional democracy preserves the elements of inclusive voting and legislative deliberation, it separates them. The citizens all vote, but they do not deliberate. One-dimensional democracy counts upon the legislature to restore the deliberative character of policy-making, but that solution is flawed. When legislators reach judgments different from those of voters, they risk losing their offices. If legislators are to engage in meaningful deliberation, they must either convince voters to trust them when they reach results the voters dislike, or they must find a way to educate voters, so that the voters will embrace the legislators' post-deliberative conclusions.

9. Fishkin, supra note 7, at 4-5.
10. Id. at 5, 21-23.
Unfortunately, large-scale elections generate incentives that make it very difficult for legislators to do either of these things. Voters are permitted, if not encouraged, to cast ballots on the basis of their own self-interest; candidates appeal to them by asking such questions as, "Are you better off now than you were four years ago?" Moreover, "voters act in secret; they are not obliged to give reasons for their vote; they choose among a very limited set of options (such as two or three candidates for political office, or "yes" or "no" to a ballot proposition); and each voter's individual ballot has almost zero weight in determining the outcome of an election."\footnote{Christopher L. Eisgruber, \textit{Civic Virtue and the Limits of Constitutionalism}, 69 Fordham L. Rev. 2131, 2138 (2001).} Under such circumstances, voters have little incentive to research their decisions or modify their own preferences out of sensitivity to minority opinion. Nor do they have any incentive to respect legislative outcomes inconsistent with their own views. The incentives of mass elections make "majority tyranny" a serious risk.

One-dimensional democrats suppose that we have no choice but to live with these problems. We should, of course, try as best we can to produce a deliberative electorate—by, for example, reforming campaign finance laws or introducing new systems of representation (such as some version of proportional representation). If these solutions do not work, however, one-dimensional democrats believe there is no coherent alternative to majority rule. They believe that, to make democracy meaningful in a large nation-state, we must lower our sights. One-dimensional democrats assume that we must settle for government by electoral majorities because we cannot attain self-government by the whole people.

\textbf{B. Two Paths to Multi-Dimensional Democracy}

Rubenfeld and I believe that it is an error to collapse democracy into a single dimension. We agree that it is possible to give a multi-dimensional account of democracy that makes the idea of government by the whole people meaningful in modern, large-scale democracies. We approach that project in different ways, however. Rubenfeld analyzes ideas about personhood and agency. He defends the idea that there exists a collective entity, the whole people, that governs itself. I examine instead our ideas about democracy. Rather than seeking to describe a collective agent that governs itself, I search for criteria that specify what it means for a group of diverse individuals to govern themselves. I will first sketch Rubenfeld's theory, and then turn to my own.
1. Democracy Through Collective Commitments

Jed Rubenfeld's *Freedom and Time* is a profoundly ambitious book. It develops a theory not just of judicial review but of individual freedom and personhood. In the course of his argument, Rubenfeld ventures into diverse domains such as cultural criticism, literary interpretation, and the paradoxes of social choice theory. Rubenfeld executes this bold project brilliantly. By virtue of its exceptional depth and craftsmanship, *Freedom and Time* rewards careful reading.

Rubenfeld tries to make the idea of democratic self-government meaningful by arguing "that a people, understood as an agent existing over time, across generations, is the proper subject of democratic self-government." That strategy might seem unpromising. As Rubenfeld cheerfully concedes, many people suppose that it is just sloppy to talk about "the people" as though it referred to a real collective agent. We have already noticed that modern polities are highly diverse. To make matters worse, the social choice theorems developed by Kenneth Arrow and others demonstrate that there will usually be no way to aggregate individual preferences into a coherent "majority will."

Rubenfeld is undaunted by these difficulties. He argues that the idea of "a people" is no more (and no less!) problematic than the idea of "a person." Although most of us are skeptical about the reality of peoples, we take for granted that we can speak meaningfully about persons. But why, Rubenfeld asks, is that? Persons, after all, comprise a bundle of thoughts, memories, preferences, expressions, and body parts at any given moment. All of these, even body parts, change over time. It is far from easy to explain how all of these can be integrated into a single subject.

According to Rubenfeld, we can resolve these difficulties only by recognizing a distinctive feature of human freedom. Although people often talk as though freedom means doing whatever you like at the moment, nobody actually lives that way. Instead, we construct our lives around projects—around commitments, to use Rubenfeld's key term. These commitments may be tiny ("understanding this paragraph") or a bit larger ("understanding this article") or very grand ("understanding democracy"). They are, in any event, what make our lives meaningful. It is (as Rubenfeld rightly suggests)

13. *Id.* at 146-47, 157.
16. Rubenfeld's reflections on this problem are set out in *Freedom and Time*. See *id.* at 106-44.
17. *Id.* at 91-102.
almost unthinkable to live without commitments for any substantial period.\textsuperscript{18} They are constitutive of our freedom: to be a free, self-governing person is to live by commitments of one’s own making.

By conceiving of individual personhood and individual autonomy in this way, Rubenfeld makes it possible to analogize peoples to persons. That would be almost impossible if personal freedom consisted of the liberty to act upon momentary preferences and inclinations. We would then run smack into Arrow’s Theorem and other lessons from social choice theory, which tell us that it is impossible to aggregate the preferences of diverse people into a coherent collective inclination. But matters are different if free persons are defined not by their capacity to act on preferences but by their ability to make and pursue commitments:

If... the freedom [to make commitments] is the distinctive human and political capacity, then it becomes possible to define a political subject not as any being with a will but as any being with the capacity to give itself a commitment. In that case, it would be possible to say not only that persons are political subjects but that peoples are as well. For a people may have legible principles even if it does not have a voice or a will.\textsuperscript{19}

This argument provides a way to understand how the people can exist as a collective agent. The people exists because persons who live together under law have the capacity to give themselves meaningful commitments, and this capacity to give and live by commitments is constitutive of human freedom—of, that is, self-government.\textsuperscript{20}

Rubenfeld argues that this “commitmentarian” perspective on self-government provides a ready justification for constitutionalism. If self-government means making and pursuing durable commitments, then “[d]emocratic self-government requires an inscriptive politics, through which a people struggles to memorialize, interpret, and hold itself to its own foundational commitments over time.”\textsuperscript{21} Written constitutionalism attempts exactly that, and hence, “constitutionalism is not counter to democracy. It is required by democracy.”\textsuperscript{22} Likewise, judicial review is an important part of democracy so understood because “the cardinal rule” of commitmentarian self-government is “that interpretation of commitments cannot be permitted to collapse into governance by the self’s present will.”\textsuperscript{23} Independent judges can

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\textsuperscript{18} Id. at 96.
\textsuperscript{19} Id. at 156. I’ve substituted “make commitments” for Rubenfeld’s actual text, which is “write.” The idea of writing plays a complex, partly metaphorical role in Freedom and Time. See infra note 69.
\textsuperscript{20} Rubenfeld, supra note 4, at 153 (“A people, for purposes of democratic self-government, is the set of persons co-existing under the rule of a particular political-legal order.”).
\textsuperscript{21} Id. at 163.
\textsuperscript{22} Id. at 168.
\textsuperscript{23} Id. at 172.
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hold the people to commitments that they might otherwise disregard, knowingly or, more likely, unself-consciously, in favor of current will.

Rubenfeld believes that for commitmentarian democracy to flourish, judicial interpretation of constitutional provisions must adopt a particular form, which he calls "paradigm case interpretation."24 Paradigm case interpretation presupposes that each constitutional provision was intended to eliminate some particular evil or else permit some particular action. The method insists that judges and other interpreters must honor this core historical intention. They need not, however, honor all the other intentions and desires the framers had. In that respect, paradigm case interpretation differs from originalism. It gives every constitutional provision an historically defined "floor, but no ceiling."25 As with any other commitment, a constitutional principle's "full entailing can never be known until they have been lived out, and lived under, for an extended period of time."26

2. The Complexity of Representative Institutions

Whereas Rubenfeld invokes metaphysical theories about personhood to explain what it means for the "whole people" to govern itself, I turn to political theory. Constitutional Self-Government identifies four goals that make democratic self-government meaningful without reducing it to majority rule.27 Impartiality demands that the government "respond to the interests and opinions of all the people, rather than merely serving the majority, or some other fraction of the people."28 Effective choice insists that the government "must be able to develop and implement policies that redress problems its citizens consider significant."29 The goal of participation requires that "any citizen willing to commit time and effort should be able to make a meaningful difference in politics and feel that politics is a rewarding part of her own life."30 Finally, the criterion of public deliberation entails that democracies "should encourage citizens to think and converse about basic questions of justice."31 A political system that satisfies all four of these criteria will implement government by the whole people, not just a majority, even though the people are never able to assemble together or govern themselves in any direct sense.

24. Id. at 178.
25. Id. at 188.
26. Id.
27. My general approach follows Fishkin's, although the set of criteria that he describes differs from my own. Fishkin, supra note 7, at 33-63.
28. Eisgruber, supra note 4, at 19.
29. Id. at 84.
30. Id. at 85.
31. Id. at 86.
Elections will be indispensable to any nation that seeks to achieve this goal. Elections guard against the possibility that the government will cater to the interests of a powerful elite; in that way, elections promote the value of impartiality. Elections transmit information to officials about what citizens want, and in that way they promote both impartiality and effective choice. Elections also provide opportunities for participation—though these may be quite limited in large-scale national elections, which are often under the control of elite politicians and strategists—and they provide occasions for public deliberation. For these reasons, any form of democracy—including those that Rubenfeld and I recommend—will rely heavily on legislatures and majoritarian elections.

Elections, however, bear only a pragmatic connection to democracy, not a constitutive one. Elections are desirable institutions only insofar as they serve democratic goals, and, as we have already noticed, they will do so only imperfectly. That is not because voters are unintelligent, amoral, or in some other way incapable of governing themselves. The problem is that “voter,” like “juror” or “legislator,” is a specific political office embedded in a network of political institutions. Like all such offices, it carries with it specific incentives. The effects of these incentives are especially serious with regard to moral issues about the relationship of government to the individual. In order to resolve such issues impartially, a government must honor moral principles even when those principles protect the interests of minorities at the expense of the majority. The incentives confronting voters give them little reason to deliberate about what rights minorities have against the government or cast their ballot on the basis of such considerations rather than their own interests.

Accordingly, it is an error to suppose that “government by the people” is identical to “government by voters.” A system that combines a variety of institutions, some directly sensitive to electoral pressure and some not, may be more democratic than a system which relies entirely on institutions and officials who are highly sensitive to electoral pressure. Constitutional Self-Government justifies the non-majoritarian features of constitutions in exactly that way. For

32. Id. at 50.
33. Id. at 80-81, 88, 97-98.
34. I described these incentives earlier in this section. See supra text accompanying note 11. For more extensive discussion, see Christopher L. Eisgruber, Constitutional Self-Government and Judicial Review: A Reply to Five Critics, 37 U.S.F. L. Rev. 115 (2002).
35. In Constitutional Self-Government, I offer a more precise characterization of what impartiality entails with regard to moral issues: “To rule impartially on moral issues, the government must decide those issues on the basis of moral reasons that have some popular appeal.” Eisgruber, supra note 4, at 57. I do not believe, however, that my argument for judicial review stands or falls on this particular interpretation of impartiality. Id. at 72. I have accordingly simplified the account here in the interests of brevity.
example, it argues that super-majoritarian amendment rules help to preserve principles and institutions that make government responsive to minority as well as majority interests. If constitutions were instead easily amendable, legislative majorities might consolidate their power by eliminating such institutions. Super-majoritarian amendment rules may thus be pro-democratic even though—indeed, precisely because—they limit the power of majorities.

Constitutional Self-Government treats judicial review in a similar spirit. It argues that judicial review is best understood as an ingredient in a complex, non-majoritarian form of democracy, not as a constraint upon self-government. “In a very simple procedural sense, judges are representatives of the people.”36 They are chosen by elected officials on the basis of their values and their political views; they are not chosen by other judges, or by competitive examination, or by a panel of elite law professors. Of course, federal judges have life tenure, and that renders them more remote from the people than most other public officials. Yet, as we have already noticed, a system that insulates some representatives from electoral pressure may be more democratic than one in which all officials are subject to direct electoral control. Life tenure facilitates a particular kind of pro-democratic function. It enhances the capacity of judges to speak on behalf of the people about issues of justice; more specifically, it enables them to resolve moral issues impartially—that is, on the basis of “reasons that flow from a genuine effort to distinguish between right and wrong, rather than from self-interest.”37

As was the case with Rubenfeld’s argument, my justification for judicial review yields recommendations about how judges should resolve difficult constitutional questions. My recommendations are comparatively simple. I do not attempt to provide judges with any sort of methodological cookbook with which to decide cases. On the contrary, I suggest that the old interpretive arguments about the relative importance of philosophy, history, and case law are overdrawn: “which [argument] works best is probably a matter of personal style.”38 What matters is not so much how judges reason, but rather what they reason about. Judges ought to acknowledge forthrightly that the questions confronting them require controversial moral and political judgments. Judges have long struggled to do just the opposite: worried that political decision-making by unelected officials is an embarrassment to democracy, they have tried to justify their controversial rulings as more or less apolitical exercises of legal technique, textual hermeneutics, or historical research. That is a mistake. Judicial review is consistent with democracy because of, rather than in spite of, its political character; judicial power is

36. Id. at 78.
37. Id.
38. Id. at 8.
justifiable because judges are pro-democratic representatives of the people, not because their professional expertise enables them to decide political questions in apolitical ways.

It does not follow that judges should exercise their power of judicial review frequently. *Constitutional Self-Government* makes a pragmatic case for judicial review. It defends judicial review on the ground that it has pro-democratic features that may compensate for the imperfections of legislatures and electorates. But, of course, judicial review has imperfections of its own—for example, all judges are drawn from a single profession;\(^{39}\) they serve long terms that may attenuate their connection to public opinion and popular judgments about justice;\(^{40}\) and they have limited tools by which to enforce the judgments they make.\(^{41}\) It is therefore possible to resist judicial review on pragmatic grounds, just as I have defended it on such grounds.\(^{42}\) It is, however, a mistake to suppose, as one-dimensional democrats do, that judicial review is necessarily undemocratic simply because it constrains the power of electoral majorities.

III. CONSTITUTIONAL SELF-GOVERNMENT

A. *Complementary Accounts of Constitutionalism*

Rubenfeld and I obviously share much in common. We are united by our dissatisfaction with one-dimensional democratic theory. We agree that democracy is something more subtle and more attractive than simple majority rule. We also believe that if democracy is properly understood, it becomes possible to defend constitutionalism and judicial review as pro-democratic institutions. We accordingly deny that super-majoritarian amendment procedures and constitutional courts are best understood as constraints upon democracy; we maintain that they should instead be regarded as ingredients in a subtle, non-majoritarian form of democracy.

With regard to the most fundamental issues in constitutional theory, Rubenfeld and I agree more than we disagree. Of course, we also have important differences. In particular, although we both reject the one-dimensional account of democracy, we disagree about how to

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39. *Id.* at 67-68.
40. *Id.* at 66-67.
41. *Id.* at 76, 173.
42. For a skeptical assessment of the judiciary's capacities, see Mark V. Tushnet, Taking the Constitution Away from the Courts 57-65, 129-53 (1999). Of course, a satisfactory assessment would have to look equally hard at all relevant institutions. As Martin Flaherty has pointed out, legal scholars have not always honored that obligation. "Modern constitutional analysis excels at subjecting what courts do to withering critique…. It provokes somewhat less awe, however, when applied to the…. ostensibly democratic alternatives to judicial intervention." Martin S. Flaherty, *Constitutional Asymmetry*, 69 Fordham L. Rev. 2073, 2075 (2001).
restore democracy’s other dimensions. Yet even here our theories complement rather than contradict one another. Indeed, we may to some extent require one another’s accounts, or at least pieces of them, in order to complete our respective pictures of multi-dimensional democracy.

For example, my theory focuses on the “spatial” rather than temporal dimensions of democracy. That is, I emphasize in Constitutional Self-Government that majoritarian elections and legislatures provide an incomplete representation of the whole people at any given moment in time—just as a snapshot provides an incomplete representation of a whole person at any given moment. I argue that judges should supplement the efforts of legislators to speak on behalf of the people about justice, by which I mean they should attempt to construct the people’s current best judgment about justice. On the other hand, I also maintain that judges may legitimately appeal to history in order to show that the people’s best judgment about justice is different from the apparent judgment expressed in opinion polls, elections, or statutes.43 I contend, for example, that Justice Brandeis’s use of history in Whitney v. California44 was defensible in exactly that way: Brandeis used a selective account of the founders’ opinions about free speech to argue that Americans had a deep commitment to liberty that was inconsistent with the anti-communist feeling of his own time.45 Yet, if the framers’ opinions are to tell us anything about the American people’s judgments about justice in the 1920s, there must be some inter-generational continuity that makes Americans of the 1920s, in one sense or another, the same “people” as the Americans who founded the republic. My theory presupposes such continuity but does not explain it. Rubenfeld’s theory provides one exceptionally sophisticated account of inter-generational political continuity. His theory of collective commitments and, more generally, his reflections on the relationship between time and democracy could help to supply the missing elements of my own theory.

Conversely, Rubenfeld’s temporal extension of democracy may require something like my account of its “spatial” dimensions. In particular, Rubenfeld argues that the judiciary is especially well-positioned to interpret and enforce the people’s commitments. He offers a brief defense of that claim. He says that the people cannot be trusted to interpret their own commitments because they are prone to reinterpret their commitments to conform to their present will. “We all imagine ourselves committed to doing right, or at least to doing no wrong, and we all find ways to tell ourselves that what we want to do

43. Eisgruber, supra note 4, at 126-27.
44. 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).
45. Eisgruber, supra note 4, at 128-30.
here and now conforms to this commitment.\textsuperscript{46} The people, says Rubenfeld, ought not to be judges in their own case.\textsuperscript{47}

This justification for judicial review is incomplete at best. After all, are not judges also tempted to reinterpret commitments to fit their own present beliefs? That worry is the focal point of most arguments against judicial review: critics complain that judges will substitute their own values for those of the people.\textsuperscript{48} This difficulty seems, if anything, more acute on Rubenfeld's theory. Rubenfeld emphasizes that our commitments give us a reason to act independent of whatever other reasons we have for acting. But other people's commitments presumably give us no such reason to act—and so, in particular, the fact that the people have made a commitment gives them a reason to act, but it does not necessarily give judges any reason to act.

Rubenfeld thus needs a more complex account of why judges are likely to be faithful to the people's commitments.\textsuperscript{49} Moreover, his account will probably have to treat judges as representatives of the people. Rubenfeld insists that the "full entailments" of a commitment "can never be known until they have been lived out, and lived under, for an extended period of time."\textsuperscript{50} As a result, judicial review is part of an "ongoing interpretive process by which we live out our commitments."\textsuperscript{51} Yet, if judges are not representatives of the people, it is hard to understand why the commitments fashioned through their interpretive choices should count as our commitments. By delegating the interpretation and enforcement functions to a third-party, the people might increase the likelihood that they will be faithful to the

\textsuperscript{46} Rubenfeld, \textit{supra} note 4, at 172.

\textsuperscript{47} \textit{Id.}

\textsuperscript{48} For an important recent statement of this critique, see Jeremy Waldron, Law and Disagreement 296-98 (1999). Rubenfeld admits that judges may experience a conflict of interest when their own powers are at stake. Rubenfeld, \textit{supra} note 4, at 173-74. But the problem is not so limited. Judges will compromise the people's commitments if they bend those commitments to fit current conceptions (or the judge's own conceptions) of justice. Rubenfeld needs to explain why we should trust judges to enforce the people's commitments, just as I must explain why we should trust judges to speak on behalf of the people. Both Rubenfeld and I must, in other words, rebut the claim that judges will use their constitutional authority to advance their own beliefs and values rather than anything (be it a commitment or a conception of justice) that can be called the people's.

\textsuperscript{49} Rubenfeld seems to say that judges will be more faithful to the people's commitments than will be the people themselves. Rubenfeld, \textit{supra} note 4, at 172 ("Referring questions of constitutional interpretation to majority will make the present citizens judges in their own case . . . ." (emphasis added)). For reasons explained in the text, that seems to me an error. It would be better for Rubenfeld to say that judges will be more faithful to the people's commitments than would be other available institutions, such as the legislature or the electorate. The electorate is not the same as the citizens, and Rubenfeld has not supplied any reason why judges should be regarded as more trustworthy than other citizens (if we are really talking about citizens rather than, say, voters).

\textsuperscript{50} \textit{Id.} at 188.

\textsuperscript{51} \textit{Id.} at 189 (emphasis added).
commitments they once made, but only at the cost of surrendering
involvement in the creative "ongoing interpretive process" that is
crucial to having and living by commitments. The exclusion of the
people from that process would seem to be a significant loss from the
standpoint of democracy. Some theorists might simply say that the
people are better off if they accept this loss in order to secure better
enforcement of their commitments. But such a position is probably
unavailable to Rubenfeld, who does not recognize any tension
between judicial review and democracy.

I accordingly believe that Rubenfeld will ultimately have to claim,
as I do, that judges are representatives of the people. Of course, he
need not endorse my particular argument for that proposition. But it
seems likely that what I say about it will be useful to Rubenfeld, just
as what he says about commitments and inter-generational continuity
will be useful to me.

B. Pragmatic and Foundational Justifications for Constitutional
Institutions

Though we have thus far concentrated on the similarities between
Rubenfeld's theory and my own, there are also important differences.
Some are readily apparent. For example, Rubenfeld argues that
democracy is about the agency and actions of a collective entity, "the
people." My theory assumes that democracy is about making
government responsive to the needs, actions, and judgment of
individual citizens. Rubenfeld believes that the point of
constitutionalism is to hold people to past commitments, even when
those commitments are inconsistent with their present will. I believe
that the point of constitutionalism is to enable the people to govern
themselves on the basis of their best current judgments about justice,
morality, and other matters. These differences lead to competing
interpretive protocols. Rubenfeld insists on what he calls "paradigm
case interpretation" in order to prevent constitutional commitments
from coinciding with current moral judgments. I call upon judges to
treat the Constitution's abstract, liberty—regarding provisions as
references to moral ideals, and I urge them to construct the people's
best current moral judgment about what those provisions require.

I want now to identify an additional point of distinction which,
though less obvious, is equally fundamental. Rubenfeld fastens a rigid
conceptual connection between democracy, constitutionalism, and
judicial review. He claims, in particular, that once we understand the
meaning of freedom and democracy, we will see that constitutionalism
and judicial review are indispensable to their attainment. According
to Rubenfeld, freedom and democracy are attainable only through the
entrenchment of durable commitments over time and, he argues, that
is precisely what constitutionalism does and what constitutionalism
alone can do. "[C]onstitutionalism is not counter to democracy. It is
required by democracy.” 52 And “written constitutionalism . . . cannot exist without judicial review.” 53 It would seem to follow that no society can be fully free and democratic unless it has a written constitution and judicial review.

My theory, by contrast, regards the connection between judicial review, constitutionalism, and democracy as pragmatic rather than conceptual. I argue that judicial review and constitutionalism are useful institutions that societies may harness to secure impartiality or other goals that are essential to democracy. I do not, however, argue that judicial review and constitutionalism are themselves essential to democracy. Nor do I contend that these institutions are the only ones that can successfully implement democratic goals, or that they will do so infallibly, or that they will do so better than any imaginable alternatives. On the contrary, I suggest that many different institutional arrangements might serve the goals of democracy. 54 For example, strong political parties might render elected officials less beholden to voters and so provide an alternative means by which to compensate for the deficiencies of mass elections. A political system that fostered strong parties might therefore have less need for judicial review than does the United States, where parties are weak. 55

This treatment of political institutions conforms to an approach pioneered within constitutional theory by Lawrence G. Sager, who has emphasized the existence of a “strategic gap” between ideals and institutions. 56 Although Sager and I insist that the assessment of constitutional institutions should have a pragmatic, partly empirical component, neither of us believes that the analysis of political institutions should reduce to ad hoc evaluation of “what works.” Any constitutional theory must tackle moral questions about the meaning of democracy and justice, or else it will have no metric by which to say which results count as “working” and which as “broken.” But once we have these moral criteria, I believe, with Sager and against Rubenfeld, that there will be a second stage of inquiry in which we must consider the actual performance of institutions and ask which best satisfy whatever criteria we have embraced. It is entirely possible—perhaps even likely—that this second stage will yield a variety of solutions. There may be multiple institutional arrangements equally well-suited to produce impartial governance, or,

52. Id. at 168.
53. Id. at 172.
54. Eisgruber, supra note 4, at 9, 21-22, 75-76.
55. Id. at 76-77.
56. Sager has pursued this theme in several articles. See, e.g., Lawrence G. Sager, The Incorrigible Constitution, 65 N.Y.U. L. Rev. 893, 944-45 (1990) (“The extrinsic linkage between a ground and procedure of choice necessarily is pragmatic rather than conceptual. The pragmatic arguments in favor of such a linkage inevitably will be soft, roughly probabilistic, and heavily tinged with local institutional experience . . . .”).
alternatively, different arrangements may promote impartiality in different circumstances. For that reason, my argument in Constitutional Self-Government attempts only to show that the judicial review and super-majoritarian constitutions are best regarded as pro-democratic devices. I do not argue, and I do not believe, that they are essential or indispensable to democracy.

Because Rubenfeld attempts to forge conceptual (rather than pragmatic) links among constitutionalism, judicial review, and democracy, his theory becomes exceptionally demanding in two different respects. First, the theory cannot be tolerant of political systems that diverge far from the American model. If, as Rubenfeld says, democracy requires constitutionalism, then we must condemn governments like the British one as undemocratic, even though most people regard Britain as a paradigmatic example of democratic government. Rubenfeld is thus in much the same boat as the one-dimensional democrats, who must condemn governments as undemocratic if they diverge from the British model. In my view, the idea that democracy always and invariably requires written constitutions and judicial review is no more attractive than the idea that democracy always and invariably requires complete legislative supremacy. Neither idea can account for the diverse institutional schemes employed by modern democracies.

Second, the theory can succeed only if it specifies moral goods that are always and uniquely served by constitutionalism and judicial review. That condition is difficult to satisfy. Most institutions bear only a pragmatic relationship to the moral ideals they serve. For example, American criminal procedure is one (imperfect) attempt to give defendants a fair trial. It would be unreasonable, however, to claim that the American system is the only way to provide a fair trial—and that is so even if we focus entirely upon basic, constitutionally secured aspects of American criminal procedure, such as the right to a jury trial. For Rubenfeld to connect ideals conceptually rather than pragmatically, the ideals he specifies must be highly refined—they must match particular institutions so closely that ideals and institutions become inseparable from one another. In my view, the pressure to meet these requirements gives Rubenfeld's theory a rather exotic shape.

57. The theory also limits the institutional flexibility of the American constitutional system. For example, because Rubenfeld forges a rigid, conceptual link between written constitutionalism and judicial review, he may have to reject the widespread view that some constitutional guarantees should be "judicially underenforced." The seminal discussion of that point is Sager's: Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1213 (1978). An important recent discussion is James E. Fleming, Fidelity, Basic Liberties, and the Specter of Lochner, 41 Wm. & Mary L. Rev. 147 (1999) (discussing underenforcement of economic rights).
One might say, then, that Rubenfeld's theory is narrow on both ends. Its theoretical foundations depend upon a very specific account of personhood. Its practical applications suggest that any country without a written constitution and judicial review is undemocratic. I find these features of Rubenfeld's theory troubling, and in the next section I raise some questions about them.

IV. FOUR QUESTIONS ABOUT COMMITMENTS

In this section, I develop four questions about commitments and their relationship to constitutionalism. All of the questions are framed in a way consistent with some key elements of Rubenfeld's theory. In particular, they do not challenge his claim that "peoples" exist as collective agents or his claim that commitments are important to self-government. My questions are designed to probe how commitments matter to peoples. One possibility is that commitments are valuable and pro-democratic only insofar as they facilitate a people's efforts to govern itself on the basis of its best current judgments about justice. At times Rubenfeld seems ready to endorse this view. He says, for example, that "[c]onstitutionalism . . . contemplates a nation pursuing justice and freedom by honoring its own higher law" and that a person cannot genuinely hold a commitment unless he retains "a kind of belief in [its] rightness." For the most part, however, the connection between justice and commitment does not figure prominently in his account. Moreover, as we shall see, he sometimes suggests that fidelity to past decisions might be valuable for its own sake, even if we now suspect that those decisions were unjust or unwise.

A. What Are Commitments?

Rubenfeld rightly believes that moral and political theorists have paid too little attention to the role of commitments in our ethical life, and his thoughtful study will be valuable to anybody interested in the topic. Rubenfeld's understanding of commitments has, however, a peculiar feature. He maintains, in effect, that commitments are valuable for their own sake. If we carry on with our projects only because we "think it best, here and now, to do so," then we do not have a genuine commitment to them. According to Rubenfeld, commitments give us a "weighty reason, in the nature of an obligation" to continue forward with something even when we "have

59. Rubenfeld, supra note 4, at 177.
60. Id. at 127.
61. Id. at 101.
no independent reason to do this thing” and when it will neither “inure to [our] benefit in any way” nor “make anyone else better off.” 62

These robust claims set Rubenfeld’s position apart from an alternative theory that regards commitments as strategic devices for the pursuit of other, more basic goals. 63 For example, Lori might commit herself to practice the piano for an hour each evening because she feared that without such a strict regimen, she would never practice at all. It seems plausible that the value of her commitment would turn entirely upon whether it helped her to learn the piano and upon whether she continued to desire to learn. If the commitment were not useful in that way, it would not give her any independent reason to act.

It is a delicate question whether commitments are only strategic devices for the attainment of other goals or whether, as Rubenfeld argues, they have independent normative force. The answer may depend upon the commitment. Rubenfeld’s key examples often involve loving attachments to particular persons. He discusses, for example, the commitment to marry somebody, 64 or to have a child, 65 or to fulfill a dying friend’s last wish. 66 It is not obvious that these commitments are typical of those made by peoples and governments. Nobody is obliged to fall in love with anybody, much less anybody in particular. By contrast, persons and peoples may indeed be obliged to commit themselves to the pursuit of justice. It seems possible that in the latter case the commitment should be regarded as entirely subordinate to the pre-existing end (that is, to justice).

If commitments had only an instrumental relationship to democracy, freedom, and other values, then constitutionalism would likewise have only instrumental value to those more basic goals. The value of constitutionalism would turn upon the likelihood that constitutional processes would produce good commitments rather than bad ones. The virtues of super-majoritarian amendment procedures would then have to be traded off against their vices: an inflexible constitution might increase the likelihood that a people would honor commitments made in the past, but it would also limit their power to revise mistaken commitments. In general,

62. Id. at 101-02. This aspect of Rubenfeld’s theory seems analogous to Ronald Dworkin’s insistence that “integrity” is an independent political value. Ronald Dworkin, Law’s Empire 164-67, 176-78, 184 (1986). Rubenfeld does not, so far as I can tell, remark on this interesting overlap with Dworkin’s theory; he treats Dworkin (somewhat inaccurately) as an advocate for “a-prioristic reasoning about the nature of democracy” and other moral issues. Rubenfeld, supra note 4, at 82.

63. Rubenfeld considers this alternative and rejects it. Rubenfeld, supra note 4, at 94-95, 117-30, 143-44.

64. Id. at 108-14.

65. Id. at 189.

66. Id. at 101-02.
constitutionalism would require a pragmatic defense of the sort that Sager and I try to provide, rather than a conceptual one.

Perhaps Rubenfeld would agree with that conclusion. After all, he cannot possibly believe that a people is always better off simply because it has constitutional commitments, regardless of their content. On the other hand, he might believe that a people is always more democratic if it has an entrenched constitution than if it does not, just as the one-dimensional democrats believe that a country is inevitably more democratic if it is more responsive to the will of electoral majorities. Rubenfeld could then say, just as the one-dimensional democrats do, that democracy is no guarantee of good results: a self-governing people may govern itself badly, producing bad commitments and bad laws. In any event, if Rubenfeld believes that the pro-democratic character of constitutional commitments is in any way contingent upon their relationship to justice or other moral values, he does not say so.

B. Why Must Commitments Be Constitutional?

Rubenfeld believes, plausibly enough, that constitutions can be defended on the ground that they are good mechanisms for making commitments. Yet, Rubenfeld in fact claims something much stronger on behalf of constitutionalism. In a striking line that I quoted earlier, he claims that “constitutionalism . . . is required by democracy.”67 I do not understand why that is so. Why must a nation have a constitution in order to make and honor commitments? Why don’t ordinary statutes suffice? Rubenfeld insists that a nation’s commitments must be inscribed so that they can persist over time.68 Yet, statutes seem to satisfy this test: they are written,69 and most have a long lifetime. No nation revises all its statutes constantly, and, indeed, no nation could do so—a point that Rubenfeld himself makes quite effectively.70

Of course, statutes are fully revisable in principle, so a people can escape statutory commitments more easily than constitutional ones. But why should that be a problem? Rubenfeld maintains that commitments must be revisable, and he accordingly insists that

67. Id. at 168.
68. See, e.g., id. at 97, 173.
69. The distinction between speech and writing figures heavily in Freedom and Time, but in a sense that is ultimately more figurative than literal. Rubenfeld calls for self-government on the model of writing . . . [n]ot because there is a necessity for a literal writing, but because temporally extended self-government is available only to beings who have what I call the freedom to write—who can communicate with themselves over time, who can give themselves texts, including legal texts, to govern their futures.

Id. at 88; see also id. at 97. Rubenfeld’s emphasis on the Constitution’s writtenness is reminiscent of another profoundly thoughtful book about the Constitution, William F. Harris II, The Interpretable Constitution (1993).
70. Rubenfeld, supra note 4, at 75-86.
constitutions must be amendable. The difference between constitutions and statutes would therefore appear to be one of degree rather than kind—and this difference in degree becomes much less significant if we shift attention from the exceptionally rigid American constitution to others around the world, most of which are much more flexible. Moreover, the personal commitments we give to ourselves as individuals are, in general, freely revisable. Because Rubenfeld’s account of democratic self-government parallels his analysis of individual self-government, it is not clear why the commitments of peoples must be entrenched through a written constitution when the commitments of persons are not.

I cannot help but wish that Rubenfeld had said more about Britain.71 The British have no written constitution, but their government is one of the most stable in the world. Would Rubenfeld want to say that the British people have no commitments? Would he want to say that they are worse off in this regard than, for example, the French, who have a written constitution—and, indeed, have had several? And what about constitutions such as those in some American states, which are freely amendable by majority vote? Do these count? What about Israel, which now has a flourishing tradition of judicial review without a written constitution?

I am sure that Rubenfeld has answers to these questions, but his position is difficult. If he concedes that Britain or Israel counts as a commitmentarian democracy, then his position will be plausible to a greater number of readers. But his defense of constitutionalism would be incomplete, since a nation could have commitmentarian democracy with or without a constitution. To finish his argument, he would have to provide arguments about why entrenched commitments produced greater net benefits than revisable ones—and that sounds, again, like the kind of pragmatic argument that Sager and I regard as necessary. If, on the other hand, he denied that Britain or Israel counted, he would find himself with an idiosyncratic evaluation of the world’s governments, and he would have to narrow his moral theory still further to explain why only entrenched commitments could suffice to make a people self-governing.

C. Why Must Constitutions Be Commitmentarian?

The last subsection inquired whether a people might have commitments without a constitution. This subsection flips the question and asks whether a people might have a constitution without having commitments (in Rubenfeld’s sense of that term). Rubenfeld seems to suppose that the whole point of written constitutions is to make commitmentarian democracy possible. He hales the American

71. He mentions Britain briefly in a way that suggests he does not regard it as fully democratic. *Id.* at 164.
founding as the first expression of a new form of democracy. Yet, Rubenfeld’s commitmentarian theory hardly seems necessary, or even apt, to explain what happened in Philadelphia in 1787. If one is forming a new democratic government for a large country, what is the alternative to a written constitution? Whenever a group of people is forming a new organization, it is useful, and often necessary, to specify its structure in writing. It is a bit grandiose, if not mystical, to claim that this structural blueprint “gather[s] up generation upon generation of Americans into a single political subject,” or that it is “a means by which a people re-collects itself and its fundamental commitments.”

I am not sure whether Rubenfeld would regard an almost purely structural Constitution—such as the American one prior to adoption of the Bill of Rights—as sufficient to establish what he calls “commitmentarian democracy.” Perhaps he would. Rubenfeld says, for example, that “[e]very grant of power to Congress—for example, the power to regulate commerce among the states—is a kind of commitment to permit.” Apparently, then, the structural provisions of the Constitution count as “commitments” in the sense that matters to Rubenfeld. On the other hand, when Rubenfeld refers to the Constitution, he often seems to have in mind not the original, structural Constitution, but its liberty—regarding supplements, such as the Bill of Rights and the Fourteenth Amendment. He occasionally writes, for example, of “commitments” and “principles” as though they were interchangeable. That focus is understandable: the struggle to interpret and honor the First Amendment seems more fundamental to the identity of the American people than the president’s power to veto legislation. Moreover, even if the practical exigencies of establishing a new government suffice to explain the need for a written constitution, they do not explain the need for a Bill of Rights. Commitmentarian logic may accordingly be more applicable to the Bill of Rights than to the structural Constitution.

We might pursue this discrimination among clauses a bit further. Suppose we agreed with Rubenfeld that commitments are essential to self-government and that commitments must be constitutional in character. Even then, it would not follow that all constitutional provisions must state commitments. Some constitutional rights might be fundamental commitments of the American people while others were not. We might count, for example, the Free Speech Clause as a commitment that defines the American people while denying such

72. Id. at 164-65. “American written constitutionalism... stood for something radically new: a democratic effort by a people to write down and live up to its own foundational commitments over time.” Id. at 43.
73. Id. at 177.
74. Id. at 185.
75. Id. at 156-57.
76. Eisgruber, supra note 4, at 38-39.
status to the Third Amendment or (more controversially) the Second Amendment.

This approach might save Rubenfeld some trouble, because, as I shall explain in the next subsection, his interpretive methodology yields uncomfortable results when applied to some constitutional clauses. I have the impression, though, that Rubenfeld would be unhappy with the suggestion: he seems to suppose that constitutions must be pervasively commitmentarian in order to be democratic. Yet, if I am correct to attribute that view to him, I am not sure why he holds it. As long as a people has some constitutionally inscribed commitments, the demands of commitmentarian democracy appear to be satisfied. Perhaps judges (and other interpreters) will encounter practical difficulties in deciding which provisions count as commitments—but I suspect, as I have already hinted, that there are countervailing practical benefits to a distinction that separates commitmentarian from non-commitmentarian constitutional provisions.

D. Should We Be Attracted to Paradigm Case Interpretation?

As I have already said, Rubenfeld recommends a particular interpretive protocol, which he labels “paradigm case interpretation.” According to that protocol, judges and other constitutional interpreters must construe constitutional provisions so to preserve the “[c]ore historical applications”77 which motivated the “act of constitution-writing” that produced the provision.78 For example, the “struggle to abolish” the black codes in the South motivated enactment of the Fourteenth Amendment; hence, any valid interpretation of the Equal Protection Clause must hold such codes to be unconstitutional.79 Rubenfeld says that the paradigm case method is the only way that judges can treat “the Constitution’s provisions . . . in terms of the actual, historical struggles of a particular people to lay down and live out its own commitments.”80

Again, I do not understand why that is so. Consider the following example, adapted from one that I use in Constitutional Self-Government.81 Sonny, who is nineteen years old, straggles home after midnight and heads for the refrigerator. Famished, he pulls out some raw fish and wine; he is too tired to cook, so he begins to eat. Grampa walks into the kitchen and is shocked. “Raw fish and wine will make you sick. Promise me this, Sonny: You will never again eat such unhealthy foods!” Sonny, ashamed of himself, makes a commitment

77. Rubenfeld, supra note 4, at 187.
78. Id. at 182.
79. Id.
80. Id. at 183.
81. Eisgruber, supra note 4, at 29-32.
never to eat unhealthy foods. The commitment is motivated by his concern that, however hungry he might have been, raw fish and wine were bad for his health.

Years pass and medical science produces results showing that, in fact, sushi and wine can be good for you. Sonny must now decide how to interpret his commitment. We can argue about whether, in the end, he should eat or refuse sushi. But it would be an error to suppose that his commitment becomes meaningless unless he avoids raw fish. Even though the commitment was motivated by a particular historical episode—eating raw fish at midnight—Sonny’s actual commitment said nothing about fish. It referred instead to a more general idea (“unhealthy food”) which has real meaning apart from the incident that provoked its use.

There are various tricks that could reconcile this point with the paradigm case method. One might say, for example, that the paradigm case for Sonny’s commitment is not the eating of raw fish, but the eating of raw fish pulled from the refrigerator late at night, or the eating of raw fish without benefit of scientific studies showing it to be healthy, and so on. But if Rubenfeld were to go down that path, his paradigm cases would do no work at all; it would always be possible to come up with a morally relevant difference (we understand things differently now than they did then) that would enable later interpreters to escape from problematic cases that motivated the adoption of a particular constitutional provision.

It is possible that when people enact abstract constitutional provisions, they mean to commit themselves to the best interpretation of the principle expressed therein, not to any particular application of it. They would, of course, never expect that the best interpretation of the principle would be inconsistent with the historical applications that motivated them to embrace the principle in the first place. But to say that they do not expect this result is not to say that they rule it out as impossible—they might simply regard it as extremely improbable.

Usually, these expectations will be well justified. What seemed an injustice when a constitutional provision was ratified will also seem unjust to later generations. And, in fact, Rubenfeld’s examples of paradigm case interpretation are quite benign from the perspective of modern liberal political theory. He argues that under his preferred methodology, segregated schools are unconstitutional, sex discrimination is also unconstitutional, and affirmative action plans are constitutionally permissible. He also argues that there are unwritten constitutional rights to contraception, abortion and homosexual intimacy.

82. Rubenfeld, supra note 4, at 192-94.
83. Id. at 196-201.
84. Id. at 201-20.
85. Id. at 247-53.
There is something ironic about this string of examples, because Rubenfeld claims that the "cardinal rule" for the interpretation of commitments is that they "cannot be permitted to collapse into governance by the self's present will."  The examples seem to produce a constitution surprisingly consistent with the "present will" of liberal constitutional theorists. Yet, if paradigm case interpretation matters at all, it will matter when it binds us to "core historical applications" that now seem unattractive, or when it prevents us from extending a principle to embrace other applications that now seem desirable. It is not difficult to find examples. Rubenfeld might have analyzed the Second Amendment. Likewise, he might have taken up the Contracts Clause; in fact, Justice Sutherland stood on firm ground when he declared that debtor relief laws, like the one at issue in Home Building & Loan Association v. Blaisdell, were precisely the evil that prompted adoption of the Contracts Clause. Does Rubenfeld believe that Blaisdell was wrongly decided? And if so, does he believe that it has significant applications today, or is he inclined to provide a limiting construction that confines it to a small number of cases (in which case, for better or worse, Rubenfeld will once again have reconciled the Constitution to present will)?

I would, of course, have no objection if Rubenfeld were able to endorse the modern, toothless interpretation of the Contracts Clause. I regard it as perverse to struggle to produce interpretations of the Constitution that are inconsistent with our best judgments about justice. More generally, I believe that the Constitution and judicial review are best justified on the ground that they help the people to govern on the basis of their best judgments about justice. Yet, in his account of paradigm case interpretation and elsewhere in his theory, Rubenfeld seems to take a different view. He seems to suppose that the Constitution is valuable and pro-democratic precisely because it sometimes allows past decisions to trump present judgments about justice. In the end, I am not sure whether I am correct to believe that Rubenfeld's view has this feature, but, if it does, it is an unfortunate and unappealing aspect of an otherwise rich and admirable theory.

V. THE NEXT GENERATION OF CONSTITUTIONAL THEORY? DEMOCRACY IN THE WORLD TODAY

John Hart Ely's classic study of judicial review included a classic statement of one-dimensional democratic theory. "[T]he choosing of values is a prerogative appropriately left to the majority," wrote

86. Id. at 172.
87. 290 U.S. 398 (1934).
88. Eisgruber, supra note 4, at 130.
89. See id. at 206.
Ely. Ely published that line, and the book containing it, in 1980. At the time, one-dimensional democracy had at least one thing to be said in its favor: it seemed roughly consistent with the structure of most free governments in the world. To be sure, the United States was not the only nation with a thriving tradition of judicial review—Ireland, the Federal Republic of Germany, and India all had active constitutional courts. But these countries seemed exceptional, and it was still possible to treat the parliamentary model as a kind of international norm.

More than two decades have now passed, and how the world has changed! Nations all over the world have embraced judicial review in one form or another, prompting Vernon Bogdanor, a political scientist at Oxford University, to write that the British parliamentary system “has become a warning of what to avoid. In the 1990s, not one of the new democracies of Central and Eastern Europe contemplated adopting the British system.”91 Thanks partly to the effects of the European Union, even Britain now has judicial review.92

Constitutional theory accordingly faces a new challenge. It no longer needs to apologize for America’s anomalous departure from legislative supremacy. Instead, its most urgent task is to account for the wide variety of institutions that modern nation states have harnessed to democratic goals. Constitutional theory must, in other words, restore the dimensions of democracy that have for so long been absent from American constitutional scholarship. Rubenfeld and I are not the first to push in that direction, nor will we be the last. I believe, though, that we are pursuing the right questions, and I am confident that Rubenfeld’s book, at least, has made a significant contribution to the debate; I hope the same is true of Constitutional Self-Government.

92. Eisgruber, supra note 4, at 77.